Filed 6/7/02

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GEORGE MARTIN WENZEL, Defendant and Appellant.	D037914 (Super. Ct. No. SCD147241)

APPEAL from a judgment of the Superior Court of San Diego County, William D. Mudd, Judge. Affirmed.

In a one-count amended information filed in July 2000, the San Diego District Attorney charged defendant and appellant George Martin Wenzel (Wenzel) under Penal Code[1] section 187, subdivision (a) with the murder of his wife Lyn Wenzel (Lyn).[2] It

1 All further statutory references are to the Penal Code unless otherwise specified.

was also alleged that in committing the murder Wenzel inflicted great bodily injury on Lyn.

In February 2001, a jury trial commenced. In March 2001, the jury found Wenzel guilty of second degree murder. The jury also found true the great bodily injury allegation. In May 2001, the court sentenced Wenzel to 15 years to life in prison.

On appeal, Wenzel asserts that the court erred by (1) failing to exclude a videotaped statement by Wenzel taken in violation of his *Miranda*[3] rights; (2) improperly commenting to the jury on the evidence; (3) failing to instruct the jury on voluntary manslaughter; (4) failing to define malice in response to a question from the jury; (5) instructing the jury under CALJIC No. 17.41.1; (6) excluding expert testimony concerning his mental state for the purpose of showing a lack of malice; (7) instructing the jury on the Wenzel's failure to submit to a court ordered psychiatric examination; and (8) instructing the jury under CALJIC No. 2.90. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *People's Case*

Wenzel and his wife Lyn lived in the Loma Riviera condominium complex in San Diego, California. To others, Wenzel and Lyn appeared to have a loving marriage.

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2 For the sake of clarity, we refer to the victim and certain members of her family by their first names. We intend no disrespect.

3 *Miranda v. Arizona* (1966) 384 U.S. 436.

In 1999,[4] Lyn was 57 years old and worked at the Department of Veteran Affairs Medical Center. Lyn's doctor, Rebecca Le Vasseur, testified that Lyn had been suffering from chronic low back pain and joint pain since 1981. In 1992, Lyn was diagnosed with fibromyalgia, a condition of chronic, widespread muscular pain. Dr. Le Vasseur also testified that Lyn suffered from irritable bowel syndrome, migraine headaches, osteoarthitis, spinal stenosis, gall bladder stones and mild hypertension. More recently, Lyn reported to her doctor "pins and needles in her toes and numbness in her feet." A neurologist tested Lyn and concluded that she did not suffer from neuropathy, a disease of the nerve endings. He believed the pain was related to Lyn's spine problems.

Lyn was examined by a podiatrist, Dr. Michael Simons, who denied that he diagnosed her with neuropathy. The notes of Dr. Simons did mention "peripheral neuropathy" but according to Dr. Simons that referred to her symptoms, not a diagnosis. On cross-examination, Dr. Simons stated that he was not sure if he told Lyn that she had neuropathy.

None of Lyn's ailments was life threatening. Moreover, despite Lyn's medical problems, "she was an optimist, and she carried on." Friends and coworkers described her as a very strong and outgoing woman, who was upbeat and a hard worker.

Wenzel was self-employed as a pool cleaner. Although he appeared to be a loving person, he was also "volatile." At times, he would "lose his temper, get very angry." He

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4 All further references to dates are to the calendar year 1999 unless otherwise specified.

was on medication to control his aggression and mood instability at the time of Lyn's death.

The day before Lyn's death, she was "great" and in a "good mood." On July 19, the morning of her death, Lyn spoke to her sister-in-law, Sheilah Wenzel (Sheilah), and told her she was "feeling good." According to Sheilah, Lyn told her a podiatrist had said the pain in her feet was from her back problems. Lyn laughed about her meeting with the podiatrist. Lyn told Sheilah she was planning to attend a business conference in Austin, Texas, in three weeks. Sheilah, who lived in Texas, was going to stay with Lyn while she was in Austin, and they talked about arrangements that needed to be made. They also discussed Lyn's plans to take a trip to Hawaii in October.

Lyn also spoke to her daughter Trudy Levy (Trudy) on July 19, approximately six hours before she was killed. Lyn and Trudy discussed a business idea Lyn had. Lyn wrote down notes of this conversation on a piece of paper. Lyn and Trudy also discussed plans for Lyn's mother's birthday. Lyn also told Trudy she was planning on going to Palm Springs in October for her high school reunion. Lyn had already purchased tickets for that event.

Later in the afternoon of July 19, a few hours before she was killed, Lyn was seen swimming in the condominium complex pool. She was swimming back and forth and enjoying herself.

The following morning, Wenzel picked up his pool cleaning helper, Patrick O'Brien, at approximately 4:15 a.m., their ordinary start time for work. O'Brien told

police that Wenzel was in a good mood and appeared fine. Wenzel and O'Brien had an ordinary workday, cleaning 25 to 27 pools.

Later that day, at approximately 1:40 p.m., Wenzel went to the downtown San Diego police station and asked to speak with a homicide detective. When San Diego Police Sergeant Howard Williams greeted Wenzel, Wenzel handed Sgt. Williams a note he had authored and a house key, and asked Sgt. Williams to read the note. The note read:

> "My name is George Wenzel. Lyn Wenzel is my wife of more than 29 1/2 years. We have had a pack [*sic*] that we would help each other end [our] life when the time had come. Last Saturday Lyn took some sleeping pills from her mother and on Monday nite [*sic*] took many pills with dinner. After she went to sleep, I went up and stopped the breathing. I did this because she is the love of my life and I wanted to stop the pain and suffering. I have no regrets because this is what she wanted. My pain and suffering will start now and last the rest of my life. Her body is in bed upstairs at 4072 Loma Riviera Circle."

Two San Diego Police Department homicide detectives, John Young and Joseph Cristinziani, then took Wenzel to a detention room where they conducted a videotaped interview with him. Detective Cristinziani first asked Wenzel, "I was just curious if there's anybody you want us to call right now?" Wenzel shook his head "no." Detective Young then advised Wenzel of his *Miranda* rights, and Wenzel responded that he understood each right. The following exchange then took place between Wenzel and the detectives:

> "[Detective Young]: . . . Do you want to tell us what happened?
>
> "[Wenzel]: *It's all right here.* [*Pointing to the note.*]

"[Detective Young]: Well, the note is pretty brief and life is pretty long. . . . [C]an you start to tell me first of all how long you've been married, where you got married, that sort of thing.

"[Wenzel]: [Shakes head in the negative.] . . . [D]idn't *you say that I could be silent if I wanted to?*

"[Detective Young]: Yeah.

"[Wenzel]: Yeah.

"[Detective Young]: So you don't want to talk to us?

"[Wenzel]: [*Shakes head 'no'.*]

"[Detective Young]: I'm sure there's a lot of questions that we don't . . . aren't gonna know until we talk to you about 'em. I mean we don't even . . . we're not even at the scene yet.

"[Wenzel]: *Maybe I'll talk to ya later. I don't want to talk right now."*

"[Detective Young]: Okay.

"[Wenzel]: Okay [nodding head in affirmative]." (Italics added.)

Thereafter, the detectives ceased questioning Wenzel concerning the killing of his wife and questioned Wenzel concerning Lyn's medical condition and obtaining her records, with which Wenzel cooperated. The detectives had Wenzel sign a form consenting to a search of his residence and a release form for Lyn's medical records.

Six minutes later, the following exchange occurred:

"[Detective Young]: I guess my question [Wenzel] is you wrote the letter and you did come down, I mean you're taking responsibility for what happened here, uh, is it just right now you don't feel like talkin' or you just don't want to tell us what happened or . . . ?

"[Wenzel]: *I don't know what else I could say. I mean it's all right here.* [*Pointing to note.*]

"[Detective Young]: Well I have a lot of questions.

"[Wenzel]: *I'm sure you do*.

"[Detective Young]: Okay.

"[Detective Cristinziani]: It's like [Detective Young] said[,] your letter is pretty short but life is pretty long.

"[Detective Young]: And there's a lot . . . of things that are going on here in 29 years that we'd like to have some background on and . . . on your wife's condition, her medical problems and what [led] up to yesterday?

"[Wenzel]: *Well you have to . . . check out Kaiser.*

"[Detective Young]: Okay."

The detectives then had Wenzel fill out another form and discussed with him the process of what was going to happen. Wenzel was reminded by the detectives twice more that, although they had questions they wanted to ask him, it was "entirely up to [him]" if he wanted to tell them what happened. Wenzel responded, "Okay, well maybe later."

Twenty-five minutes later, Detective Young said to Wenzel:

"[Detective Young]: "You know [our fact gathering] is based on the cooperation of the people we're dealing with. You know, you have absolutely every right not to talk to us. . . . I have a lot of questions . . . ."

Shortly thereafter, Wenzel began talking to the detectives about what occurred. Wenzel stated that he and Lyn had made a pact. According to Wenzel, Lyn came home from work on July 19 and, although she did not say anything, he knew she was in pain. Before dinner, Lyn asked Wenzel "[i]f [he] was strong enough." Wenzel replied, "Yes"

or "If I have to be." Wenzel explained that Lyn had fibromyalgia and on July 15 was told by a podiatrist that she had neuropathy. Lyn was "broken up" over the diagnosis of neuropathy. Lyn told Wenzel that night that she had taken some pills. Wenzel told police that when Lyn went upstairs to their bedroom, he stayed downstairs for approximately 30 minutes. He then went upstairs and found Lyn asleep. Wenzel could hear her breathing and snoring. He lay down next to her and watched her for approximately one hour. Wenzel demonstrated for the detectives how he placed his hand over Lyn's mouth and pinched her nose with his fingers to stop her breathing. He did this for 30 to 45 minutes. He knew when she was dead because he heard the "last bit of air in her . . . bubbling out." Wenzel explained to police that he did it because "I love my wife" and "I did it for her." Wenzel stated that she asked him to do it, stating "it's time." Wenzel stated that when he woke up the following morning he drank coffee, walked the dog and went to work.

A pathologist's examination of Lyn's body showed she died of asphyxiation by smothering. Her eyes, eyelids and upper lip showed petechial hemorrhages consistent with being asphyxiated. These small hemorrhages indicate an attempt to breathe. A bruise was found on Lyn's lower lip that was caused while she was still alive. Beyond the bruised lip, Lyn's body showed no signs of trauma. Lyn did not die from an overdose of sleeping pills. No pills or pill fragments were found in Lyn's stomach. 2.1 nanograms per millimeter of triazolam, a sleeping pill, were found in Lyn's blood. The therapeutic amount of triazolam is between 2.0 and 20.0 nanograms per milliliter. The pathologist concluded that Lyn's death was a homicide.

Days later, at a memorial service for Lyn, Wenzel told his stepdaughter Trudy and a family friend, Judy Collins, the circumstances of Lyn's death. Wenzel told them essentially the same story as in his note and confession to the police. He also told Judy Collins that he knew a good attorney that could "get [him] off."

On October 13, 12 weeks after killing Lyn, Wenzel married Nancy Rehm, a woman who lived in the same apartment complex as Wenzel and Lyn. According to Rehm, they had started dating 12 days prior to their marriage. However, Rehm testified that she first met Wenzel before Lyn's death, when she asked him to flip her mattress in her bedroom. Rehm described herself as very lonely for a long time prior to meeting Wenzel. Shortly after they met, Wenzel told Rehm how Lyn died. Again, Wenzel's story matched the statements he had given to police and others.

Wenzel and Rehm were seen together within a few weeks of Lyn's death, and Wenzel was seen going into Rehm's apartment. Wenzel did not tell his stepson, Ted Levy, that he had remarried until the summer of 2000. Although Wenzel told his brother, John Wenzel, in November about his marriage to Rehm, Wenzel told him not to tell anybody about it and got mad at John for discussing the marriage.

B. *Defense Case*

Lizabeth Keith, a neighbor of Wenzel and Lyn, testified that in early 1999 Lyn told her that she had a durable power of attorney for healthcare.[5] Keith was going

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[5] According to John Wenzel, Lyn did not in fact have a durable power of attorney for healthcare, nor any similar provision in her will.

through chemotherapy, and she and Lyn agreed that there were some things worse than death. Leslie Satz, a coworker of Lyn's, testified that Lyn told her that she would not want to live if she were ever "gravely disabled." Lyn had a similar conversation with her sister Sheilah in 1995 or 1996, while they were discussing a 95-year-old man who could no longer care for himself. Lyn's son Ted Levy testified that on July 15, 1999, he called Lyn and "she was crying and upset about something and said she had just been to the doctor." However, Lyn would not tell Ted Levy what it was that had upset her.

Several witnesses testified that Wenzel and Lyn had what appeared to be a very loving and devoted relationship. Lyn told her boss that she was in pain and was disappointed over her failed efforts to lessen that pain. Lyn's mother-in-law Olive Wenzel testified that Lyn had a lot of problems with her health, many times being unable to throw a ball to her pet dog. Virginia Hemond, a friend of Lyn's, testified that Lyn complained to her about the pain she was suffering. A couple of days before her death, O'Brien observed Lyn as being "pretty down as far as this neuropathy . . . she just found out she had." John Wenzel knew Lyn had fibromyalgia, was in pain, and was not getting any satisfaction from medical attention. Several others also testified to Lyn's ailments and pain.

Wenzel called Dr. Clark Smith, a board-certified psychiatrist, who diagnosed Wenzel as suffering from bipolar mood disorder, with a dependent personality trait. Dr. Smith testified that Wenzel was prone to form dependent relationships and that his reality testing was "unrealistic and poor." Dr. Smith further stated that Wenzel's moods would

go up and down rapidly and unexpectedly. Dr. Smith also opined that under stress Wenzel was "unable to think it through rationally and make rational choices."

Wenzel also sought to examine Dr. Smith as to the mental state of a hypothetical person with Wenzel's mental disorder at the time of a killing such as Lyn's. However, the court excluded this evidence as going to an ultimate issue that the jury was to decide: Wenzel's intent at the time he killed Lyn.

Dr. Le Vasseur testified that she prescribed two drugs to Wenzel, Depakote and Trazodone, for his mood instability.

Rehm testified that she and Wenzel did not begin dating until September 30. The next day they walked on the beach and Wenzel told her the details about how he killed his wife. After dinner that night, she and Wenzel talked about having sex. Rehm insisted that Wenzel get tested for HIV before they had sex. Four days later, Wenzel called Rehm at work and asked her to go on a trip with him to Big Bear, Yuma and Palm Springs. When they went on the trip, Wenzel brought a certificate showing he did not have HIV and asked Rehm to marry him.

Dr. Stephen Shuchter, a psychiatrist specializing in depression and bereavement, testified that after the loss of a loved one, men remarry more quickly than women do. Dr. Shuchter testified that one out of every eight men become involved in a romantic relationship within two months after the death of a loved one.

C. *People's Rebuttal*

The parties stipulated that before trial the court ordered Wenzel to make himself available for a psychiatric or psychological examination in the presence of an expert

selected by the People. When Wenzel showed up at the appointment, he handed the state's psychiatrist, Dr. Steven Ornish, an envelope and said he would be right back. However, instead of coming back, Wenzel got into his car and drove off. Dr. Ornish opened the letter, which read:

> "I understand I've been ordered to meet with you and provide you information about myself. You should have 2,000 pages of discovery, videotaped statement I gave police, along with a note, Dr. Smith's two reports, and Dr. Lipsom's testing. I do not want to speak with you further because I believe you're not a neutral expert."

Based upon Wenzel's failure to appear for his court-ordered examination, the court warned Wenzel, before he called Dr. Smith as a witness, that if he pursued any mental health issues, the jury would be instructed on his failure to cooperate.

D. *Motion to Suppress Confession*

Prior to the start of trial, Wenzel made a motion to suppress his videotaped confession based upon an alleged violation of his *Miranda* rights. At the hearing on Wenzel's motion, Detectives Young and Cristinziani testified that they did not believe that Wenzel invoked his right to remain silent when they were interviewing him. Rather, they understood Wenzel's comment that he would maybe talk to them later as indicating that he did want to talk to them, but later on. They believed that Wenzel just needed time before he was ready to discuss what happened. The detectives also testified that they did not think they were interrogating Wenzel when they were asking him questions concerning obtaining Lyn's medical records, a consent to search and handwriting exemplars.

The court denied Wenzel's motion to suppress, finding:

> "The videotape in this case makes this decision actually as clear as it can be under the circumstances. . . . [¶] What is very apparent in this particular case is that we do not have a direct invocation of the right to remain silent. It is equivocal at best . . . . [Wenzel] says maybe I'll talk to you later; I don't want to talk right now. . . . [¶] In order to put that in perspective, you have to look at that videotape as to what [] Wenzel was doing at the time. And he had just basically said it's all right here, pointing to the note. Well, when he's pointing to the note, he's talking about her death and what he had admitted in the note, namely, that he had killed her. [¶] This is equivocal, very equivocal."

The court also noted that when Wenzel stated that he did not want to talk "right now," the detectives only questioned Wenzel about things that did not implicate his *Miranda* rights. The court also observed that later in the interview, the detectives readvised Wenzel, and he thereafter cooperated and answered questions about Lyn's death without any coercion.

E. *Relevant Court Instructions*

At the close of evidence Wenzel requested that the court instruct the jury on manslaughter, based upon a heat of passion theory. The court, based upon the evidence, refused to instruct the jury on the crime of manslaughter.

The court instructed the jury on Wenzel's failure to appear for a mental examination as follows:

> "[Wenzel's] refusal to submit to a court-ordered psychiatric examination may be considered by you. If you find that his refusal to answer questions or to be interviewed by the prosecution's psychiatrist was wil[l]ful, you may take that fact into consideration when weighing the opinions of the defense'[s] psychiatric expert."

The court instructed the jury under CALJIC No. 2.90 as follows:

> "A person accused in a criminal action with the commission of a crime is presumed innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. Rather, it is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

During deliberations, the jury foreperson handed the court a note that stated:

> "Your Honor, [¶] "We are concerned that one member of the jury may be disregarding the instruction to base our decision solely on the evidence presented and on the law. [¶] The statement that concerns us is the following: 'I have a reservation. I can never know because I wasn't there. I'm not sure that she wasn't already dead.'"

Over defense objection, the court instructed the jury in response to this note as follows:

> "You are advised of the following: I have not intended by anything that I have said or done or by any questions that I may have asked to suggest what you should find to be the facts or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will totally disregard it and form your own conclusions. [¶] At this time, however, and for the purpose of assisting you in properly deciding this case, I will comment on the evidence and the testimony and believability of any witness. My comments are intended to be advisory only and are not binding on you, as you must be the exclusive judges of the facts and of the believability of witnesses. You may disregard any or all of my comments if they do not coincide with your views of the evidence and the believability of the witness. [¶] You are advised in this case that there is no evidence that this victim was already dead when [Wenzel] placed his hand over her nose and mouth. In fact, all of the evidence in this case, including the pathologist's report and testimony and [Wenzel's] own statements show the victim was alive at the time he placed his hand over her nose and mouth."

The court instructed the jury on malice under CALJIC No. 8.11 as follows:

> "'Malice' may be either express or implied. [¶] Malice is express when there is manifested an intention unlawfully to kill a human being. [¶] Malice is implied when: [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. [¶] The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. [¶] The word 'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act."

During deliberations, the jury sent the court a note that read:

> "We need clarification on several terms. [¶] 1. Please give a clear definition of express malice. [¶] 2. What is meant by 'conscious disregard for human life' under implied malice?"

In reply, the court stated: "Ladies and gentlemen, you are instructed to reread [CALJIC No.] 8.11. Use your common sense and your life experiences in defining the terms."

The court also instructed the jury under CALJIC No. 17.41.1 (1998 new) (6th ed. 1996) as follows:

> "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation."

DISCUSSION

A. *Alleged Miranda Violation*

1. *Standard of Review*

In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda*, the scope of our review is well established. "We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.]" (*People v. Boyer* (1989) 48 Cal.3d 247, 263, cert. denied (1989) 493 U.S. 975, disapproved on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) "However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]" (*People v. Boyer*, *supra*, at p. 263; see also *People v. Box* (2000) 23 Cal.4th 1153, 1194 (*Box*).) "'We apply federal standards in reviewing [a] defendant's claim that the challenged statements were elicited from [the defendant] in violation of *Miranda*.'" (*Box, supra,* 23 Cal.4th at p. 1194.)

2. *The Miranda Rule*

"In *Miranda,* the court laid down a rule of a 'prophylactic' nature [citation] in order to protect the privilege against self-incrimination of the Fifth Amendment to the United States Constitution,[6] as applied to the states through the due process clause of the

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6 "The Self-Incrimination Clause of the Fifth Amendment provides that no 'person . . . shall be compelled in any criminal case to be a witness against himself.'" (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 588, fn. omitted (*Muniz*).) "At its core, the

Fourteenth Amendment: '[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant [by law enforcement officers] unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 726-727, quoting *Miranda*, *supra*, 384 U.S. at p. 444.)

3. *Invocation of Miranda rights*

"Once a suspect receives *Miranda* warnings, he 'is free to exercise his own volition in deciding whether or not to make a statement to the authorities.' [Citation.]" (*Box*, *supra*, 23 Cal.4th at p. 1194.) However, once warnings are given, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Miranda*, *supra*, 384 U.S. at pp. 473-474.) Once an individual invokes his or her right to remain silent, police may not attempt to circumvent this decision "by refusing to discontinue the interrogation upon

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privilege [against self-incrimination] reflects our fierce '"unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt,"' [citation], that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury. [Citation.]" (*Id.* at p. 596.)

request or by persisting in repeated efforts to wear down his resistance and make him change his mind." (*Michigan v. Mosley* (1975) 423 U.S. 96, 105-106.)

However, if a suspect's "invocation of the right to remain silent is ambiguous, the police may 'continue talking with him for the limited purpose of clarifying whether he is waiving or invoking those rights.' [Citations.]" (*Box, supra*, 23 Cal.4th at p. 1194.) The inquiry into whether a defendant has unambiguously invoked *Miranda* rights is an objective one. (*Davis v. United States* (1994) 512 U.S. 452, 458-459.) This inquiry asks what "a reasonable officer in light of the circumstances would have understood." (*Id.* at p. 459.)

Thus, for example, the California Supreme Court held that a defendant did not invoke the right to remain silent when he stated, "I don't know if I wanna talk anymore." (*People v. Wash* (1993) 6 Cal.4th 215, 238-239 (*Wash*).) In another case, the high court found that a defendant did not invoke the right to remain silent when, in response to questioning by police about particular facts leading up to a murder, he said, "I don't know. I really don't want to talk about that." (*People v. Silva* (1988) 45 Cal.3d 604, 629-630.) The court held that the statement was not an invocation of the right to remain silent, but rather only indicated an unwillingness to discuss a certain subject. (*Ibid.*)

In *People v. Jennings* (1988) 46 Cal.3d 963 (*Jennings*), during questioning by police a defendant stated: "I'll tell you something right now. You're scaring the living shit out of me. I'm not going to talk. You have got the shit scared out of me," and "I'm not saying shit to you no more, man. You, nothing personal man, but I don't like you. You're scaring the living shit out of me . . . . That's it. I shut up." (*Id.* at p. 977.)

However, the high court held that these statements, viewed in context, did not establish an invocation of the right to remain silent:

> "Were we to base our decision solely on the reporter's transcript of those portions of the interview on which appellant relies, his claim that he invoked his right to silence would appear meritorious. On a review of the full tape and consideration in context of the words on which defendant relies a different picture emerges. That part of the first interview at which defendant claims he asserted his rights involved a few minutes when defendant lost his temper and expressed anger toward Officer Cromwell . . . . [¶] . . . Viewing the tape, observing the defendant's demeanor before, during, and after the statements, and considering the context in which defendant made the statements on which he relies here, we conclude that the statements reflect only momentary frustration and animosity toward Cromwell. . . . [¶] . . . Defendant did not, by those statements, indicate that he was invoking his right to silence. He apologized for his outburst and voluntarily continued the interview. The trial court did not err, therefore, in admitting the statements." (*Jennings, supra,* 46 Cal.3d at pp. 978-979.)

4. *Analysis*

We conclude, based upon our independent review of both the written transcript and videotape of the police interview with Wenzel (*Wash, supra,* 6 Cal.4th at p. 238), that Wenzel did not invoke his right to remain silent and therefore there was no violation of his *Miranda* rights and no error in admitting that interview into evidence at trial. Further, even if the court did err in admitting Wenzel's interview with police, the error was harmless beyond a reasonable doubt.

Viewed in context, Wenzel did not unambiguously invoke his right to silence. When he first arrived, he handed police a note confessing to the killing of his wife and asked to speak with a homicide detective. This indicates a desire to speak concerning the crime. Thereafter, after being given *Miranda* warnings, when the detectives began

questioning him concerning the crime, Wenzel replied, "It's all right here," pointing to the note. This statement was not an invocation, but rather an explanation that the note described what happened. Next, Wenzel, in response to questioning, asked, "[D]idn't you say that I could be silent if I wanted to?", to which the detectives responded in the affirmative. This was at most a question to police about his rights, not an invocation, following which the detectives could properly question Wenzel further to determine if he wished to talk to them.

The statement, "Maybe I'll talk to you later. I don't want to talk right now," taken in context, is ambiguous. A reasonable police officer under the circumstances could understand that statement not as an assertion of the right to silence, but rather an expression of a willingness to talk when Wenzel was ready.

After Wenzel made that statement, the detectives inquired concerning Lyn's medical records, a consent to search, and a handwriting exemplar. These types of inquiries do not constitute interrogation that implicates *Miranda* rights. (*People v. Woolsey* (1979) 90 Cal.App.3d 994, 1001; *Muniz, supra*, 496 U.S. at pp. 601-602.) Further, Wenzel voluntarily discussed these issues, indicating he was not invoking the right to silence. A review of the videotaped interview also establishes that the detectives' continued questioning did not amount to "repeated efforts to wear down his resistance and make him change his mind." (*Michigan v. Mosley*, *supra*, 423 U.S. at pp. 105-106.)

Wenzel relies on the case *People v. Peracchi* (2001) 86 Cal.App.4th 353 (*Peracchi*), where the defendant's statement, "I don't want to discuss it right now" was found to be an assertion of the right to remain silent. (*Id.* at pp. 358-361.) However,

Peracchi is not controlling. First, Wenzel indicated he did not want to discuss the matter at that point, but left the door open to further discussion by stating, "maybe later." Further, after the defendant's statement in *Peracchi*, the police, apparently understanding that he had invoked his *Miranda* rights, continued questioning him, asking why he did not want to talk to them. (*Id.* at pp. 360-361.) Here, by contrast, the detective moved to neutral noninterrogatory subjects after Wenzel indicated that he did want to discuss the matter at that time. It was only later, after twice readvising Wenzel on his right to silence, that Wenzel started voluntarily discussing the circumstances of Lyn's death. The context of the interview, after Wenzel had already confessed in writing and indicated he wanted to discuss the matter with police, also distinguishes this matter from *Peracchi*. Finally, the court in *Peracchi* relied only on a written transcript of the interview. (*Id.* at p. 358.) Here, viewing the videotape, we agree with the trial court that the context of Wenzel's statements, as well as Wenzel's demeanor during the interview, did not indicate an unambiguous invocation of his right to silence. In sum, the court did not err in denying Wenzel's motion to suppress his videotaped confession.

Assuming the court did err in admitting the police interview with Wenzel, the error was harmless beyond a reasonable doubt. (See *People v. Sims* (1993) 5 Cal.4th 405, 447-448 [harmless beyond a reasonable doubt standard applies to confession improperly admitted in violation of *Miranda* rights].) Wenzel confessed to the police in his handwritten note delivered to them prior to the interview. In that note he stated that he stopped Lyn's breathing, and he did so pursuant to a suicide pact to stop her suffering.

He repeated the same story to *four* separate witnesses, including his new wife Rehm.[7] All these statements essentially told the same story Wenzel told police in his videotaped interview. Wenzel's other confessions, substantially the same as the interview with police, render any error in admitting the interview harmless beyond a reasonable doubt. (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1403.) Finally, the pathologist's testimony confirmed that the cause of Lyn's death was from asphyxiation. Thus, Wenzel's claim that he would have been able to argue he only passively assisted Lyn's suicide but for the videotaped confession is contrary to the overwhelming evidence that she died at his hands. Any error by the court in admitting Wenzel's videotaped confession was harmless beyond a reasonable doubt.

B. *Court's Comment on Evidence*

Wenzel asserts that the court erred when, in response to a question from the jury concerning a juror's purported failure to follow the court's instructions, it commented on the evidence by stating that there was no evidence that Lyn was already dead at the time Wenzel went upstairs. We reject this contention.

The California Constitution, article VI, section 10, provides that a court "may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." "The purpose of

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7 Wenzel briefly asserts that he could have resisted the people's attempt to elicit Rehm's testimony regarding Wenzel's confession to her on the grounds of marital privilege. However, since the confession was made to Rehm before they were married, the marital privilege does not apply. (Evid. Code, § 972, subd. (f).)

this provision is to allow the court 'to utilize its experience and training in analyzing evidence to assist the jury in reaching a just verdict. [Citations.]' [Citation.]" (*People v. Proctor* (1992) 4 Cal.4th 499, 542.) Further, "a trial court has 'broad latitude in fair commentary, so long as it does not effectively control the verdict.'" (*Ibid.*) However, "'judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]' [Citations.]" (*Ibid.*)

Wenzel first attacks the court's comment on the basis that it was based, at least in part, upon the improperly admitted videotaped interview he gave to police. However, we have already concluded, *ante*, that the court did not err in admitting this evidence. Wenzel's contention is thus unavailing.

Further, it cannot be argued that the court's comment on the evidence was anything but scrupulously accurate. There is *no* evidence that Lyn was dead when Wenzel went up to her bedroom. In fact, all the evidence, including Wenzel's written and oral confessions, his admissions to others, and the pathologist's conclusion concerning the cause of death, all conclusively demonstrate that Lyn was alive when Wenzel went into the bedroom. Indeed, counsel for Wenzel, in closing argument, never asserted that Lyn died at her own hands that night. Wenzel's only argument was with regard to his intent in taking her life, i.e., he was assisting in her request to end her life to stop her chronic pain.

Wenzel complains that the court's comment was "tantamount to a direct[ed] verdict on guilt" because the court "essentially told this jury that [Wenzel] killed his wife." This is not so. The court's comment did not negate Wenzel's sole defense that he did not have the requisite intent to be found guilty of murder. The jury was still free to acquit Wenzel if it agreed with his claim that the killing was not performed with malice. The court did not remove an element that the jury was to decide, as Wenzel himself admitted that he killed his wife.

Finally, given that the court also instructed the jury that its comments were advisory only and not binding upon them, any error caused by the court's comments was harmless: "Where the trial court instructs the jury that they can wholly disregard any comment by him, that they are the exclusive judges of the credibility of witnesses and of all questions of fact submitted to them, and that his comments were for the purpose of aiding the jury in reaching a verdict but not to compel one, there is no reversible error in connection with the court's comments on the evidence." (*People v. Jones* (1970) 7 Cal.App.3d 48, 54-55.) We conclude that the court's comments on the evidence here do not support a reversal of the judgment.

C. *Court's Refusal To Instruct on Manslaughter*

Wenzel contends that the court erred in refusing to instruct the jury, upon his request, on voluntary manslaughter under a heat of passion theory. We reject this contention.

1. *Standard of review*

"[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) Substantial evidence is "'evidence that a reasonable jury could find persuasive.' [Citation.]" (*Ibid.*) Thus, on review, we must determine here whether there is substantial evidence to support a conviction on heat of passion manslaughter instead of second degree murder.

2. *Analysis*

Section 192, subdivision (a) provides:

> "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: [¶] (a) Voluntary—upon a sudden quarrel or heat of passion."

In order to justify a voluntary manslaughter instruction, a defendant must produce substantial evidence that at the time of the killing his "reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" [Citations.] "'[N]o specific type of provocation [is] required . . . .'" [Citation.] Moreover, the passion aroused need not be anger or rage, but can be any ""[v]iolent, intense, high-wrought or enthusiastic emotion"" [citation] other than revenge [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 162-163 (*Breverman*).) Although it is generally for the jury to decide if the circumstances were sufficient to arouse the passions of a reasonable person, the court

may decide the issue where the evidence of provocation is slight. (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705.)

Thus, in order to establish facts supporting a heat of passion manslaughter instruction Wenzel must demonstrate (1) that he actually acted under a heat of passion and (2) that Lyn did something so provocative as to cause an ordinary person to act under a heat of passion. There is no substantial evidence to support either element.

Focusing first on whether there is any evidence that Wenzel was actually acting in the heat of passion, we find no substantial evidence in the record. In his statements to police and others, Wenzel claimed that he was acting pursuant to a long-planned suicide pact, not under a sudden and extreme emotional upset. He stated that after Lyn went to bed, he stayed downstairs for approximately 30 minutes. Later, he went upstairs, lay down next to Lyn, and spoke to her for an hour as she was sleeping. Wenzel then held his hand over her mouth and pinched her nose for 30 to 45 minutes, until he heard her last breath escape. There is no evidence that Wenzel went upstairs and killed Lyn on a sudden impulse caused by strong passions. Rather, the act was done with reflection and deliberation.

Further, Wenzel cannot show that Lyn did anything that was sufficient to provoke a reasonable person toward lethal passion. "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of

average disposition to act rashly or without due deliberation or reflection." (*People v. Lee* (1999) 20 Cal.4th 47, 59 (plur. opn. of Baxter, J.).) Wenzel must show that "an average, sober person would be so inflamed that he or she would lose reason or judgment." (*Id.* at p. 60.)

Wenzel asserts that Lyn's poor health, his own mental condition, Lyn's request that he help her with their suicide pact, and her asserted question, "[A]re you strong enough?", were sufficient provocation to support a manslaughter instruction. This contention is unavailing.

A provocation that is of so little consequence that it would not impair an ordinarily reasonable person's ability to form malice is not sufficient to reduce a killing from murder to manslaughter. (*People v. Ogen* (1985) 168 Cal.App.3d 611, 621.) Further, any provocation that occurs must be immediately present at the time of a killing. (*People v. Koontz* (May 9, 2002, S036450) ___ Cal.4th ___ [2002 D.A.R. 5057, 5068].) In *Koontz*, the defendant argued to the California Supreme Court that the trial court should have instructed the jury on manslaughter in a case where the defendant shot and killed another individual after an argument. (*Ibid.*) However, the court rejected this argument because any confrontation between the defendant and the victim had dissipated by the time of the shooting: "Any provocation arising out of defendant's prior arguments with the victim was no longer immediately present by the time of the shooting, such that a reasonable person in defendant's position would have reacted with homicidal rage." (*Ibid.*)

Here, Lyn's health, her request that Wenzel assist in her suicide, and the question, "[A]re you strong enough?" could hardly be considered provocative. According to Wenzel this came about as a result of a longstanding illness, and a long-planned "pact" whereby each would help the other to commit suicide if necessary. The events on the day of the killing were not sudden or out of the blue. There is no indication the question, "[A]re you strong enough?" was meant to be insulting. Indeed, the evidence demonstrates that Wenzel was *not* in any way provoked, remaining downstairs for half an hour before he went upstairs and suffocated Lyn. Finally, any provocation that could have occurred as a result of the question, "Are you strong enough?" was no longer immediately present by the time Wenzel walked upstairs a half hour later and lay down next to his wife for an hour.

Wenzel asserts that the case *People v. Borchers* (1958) 50 Cal.2d 321 (*Borchers*) supports his contention that the court erred in failing to instruct the jury on manslaughter. In *Borchers,* the defendant's common law wife admitted to having an affair with an individual who was plotting a possible murder against the defendant to obtain his life insurance benefits. (*Id.* at pp. 324-325.) On one occasion the defendant's wife attempted to jump from the car he was driving, stating that "she wished she were dead . . . ." (*Id.* at p. 325.) During another drive, the defendant's wife took a gun out of the glove department and asked the defendant to shoot her. (*Id.* at pp. 325-326.) Once the defendant had the gun, his wife told him, "Go ahead and shoot, what is the matter, are you chicken." (*Id.* at p. 326.) Based upon these facts the California Supreme Court

concluded that there was sufficient evidence to support the trial court's reduction in the jury's verdict from second degree murder to manslaughter:

> "From the evidence viewed as a whole the trial judge could well have concluded that defendant was roused to a heat of 'passion' by a series of events over a considerable period of time: [his wife's] admitted infidelity, her statements that she wished she were dead, her attempt to jump from the car on the trip to San Diego, her repeated urging that defendant shoot her, [a child she cared for], and himself on the night of the homicide, and her taunt, 'are you chicken.'" (*Id.* at pp. 328-329.)

Wenzel asserts that similarly the evidence in this case supports a manslaughter instruction because of Lyn's long-standing illness and her statement, "[A]re you strong enough?" However, that statement can hardly be compared to the taunt in *Borchers*. Nor is there any evidence, as discussed, *ante*, that there was any provocation immediately preceding Wenzel's killing of Lyn. There is also no evidence that Lyn had done anything to provoke Wenzel to kill her, such as Borcher's wife's admitted affair. The facts in this case do not equate to those in *Borchers*.

Wenzel also asserts that the evidence in this case was sufficient to show heat of passion manslaughter as his love for his wife, combined with her chronic pain, overcame his senses. While it is true that the "passion" necessary for voluntary manslaughter need not be anger or fear, but can be any """[v]iolent, intense, high-wrought or enthusiastic emotion"" [citation] other than revenge [citation]" (*Breverman, supra*, 19 Cal.4th at p. 163), the facts do not support a voluntary manslaughter instruction here. As we have already discussed, the facts do not show a killing committed in the heat of passion, but rather a planned, calm event. Further, even if Wenzel were able to show that at the time

of the killing he was overwhelmed by his love for Lyn and her desire to die, as we have also discussed, *ante*, there is no evidence of provocation on her part sufficient to support a manslaughter instruction.

Finally, it is doubtful that a spouse's love and caring for his or her ill spouse can ever support a manslaughter instruction where the ill spouse requests that the other kill him or her to end suffering, and the defendant does so. In *People v. Matlock* (1959) 51 Cal.2d 682 (*Matlock*), the California Supreme Court was presented with the issue of whether someone who actively participates in an individual's suicide, pursuant to the victim's request, can be found guilty of advising or encouraging a suicide under section 401,[8] or only of murder. The high court held that one who actively participates in causing the victim's death can only be convicted of murder:

> "'[W]here a person actually performs, or actively assists in performing the overt act resulting in death, such as shooting or stabbing the victim, administering the poison, or holding one under water until death takes place by drowning, his act constitutes murder, and it is wholly immaterial whether this act is committed pursuant to an agreement with the victim, such as a mutual suicide pact.'" (*Matlock, supra,* 51 Cal.2d at p. 694.)

We had the occasion to address the holding in *Matlock* in *People v. Cleaves* (1991) 229 Cal.App.3d 367 (*Cleaves*), wherein the defendant argued that he only killed the victim who was suffering from AIDS at the victim's request and to relieve his suffering. (*Id.* at pp. 372-373.) Pursuant to the victim's request, the defendant assisted

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[8] Section 401 provides that: "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."

him in strangulating himself. (*Ibid.*) At trial, the court only instructed the jury on second degree murder, refusing to instruct the jury on assisting suicide, voluntary and involuntary manslaughter. (*Id.* at pp. 374-375.) The defendant was convicted of second degree murder and appealed to this court. (*Id.* at p. 371.)

Relying on *Matlock,* we rejected the defendant's contention that the facts supported a manslaughter instruction based upon his asserted lack of malice:

> "[Defendant] asks us to fashion a manslaughter crime for a killing done at the victim's request, based on the absence of malice, which does not now expressly exist under California law. . . . As recognized by [defendant], our Supreme Court in [*Matlock, supra,* 51 Cal.2d at page 694,] defined a killing pursuant to an agreement with the victim as murder. Although *Matlock* does not address the absence of malice issue, as a lower tribunal we decline to deviate from the parameters of *Matlock*." (*Cleaves, supra,* 229 Cal.App.3d at p. 376.)

Likewise here, although the precise issue presented is whether love and a suicide pact can combine to demonstrate a lack of malice sufficient to reduce a crime to manslaughter, we are also constrained by the holding in *Matlock,* as well as our decision in *Cleaves*, that a mercy killing done at the request of another, even if motivated by love, is murder, not manslaughter.

Finally, contrary to Wenzel's suggestion, his own mental condition cannot support a finding of provocation. The victim must cause the provocation. (*People v. Lee, supra,* 20 Cal.4th at p. 59 (plur. opn. of Baxter, J.); *In re Thomas C.* (1986) 183 Cal.App.3d 786, 798 [defendant's depressed mental state does not constitute provocation].) The court did not err in refusing to instruct on voluntary manslaughter.

D. *Court's Instruction on Malice*

Wenzel contends that the court erred when it instructed the jury, in response to their question concerning the definition of express malice and conscious disregard for human life under implied malice, that it should reread CALJIC No. 8.11 (quoted, *ante*) and use their common sense and life experiences to understand that instruction. We reject this contention.

Section 1138 provides in part that:

> "After the jury have retired for deliberation . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given."

Thus, the "court has a primary duty to help the jury understand the legal principles it is asked to apply." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) However, "[t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. . . . It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*Beardslee, supra,* at p. 97.)

Here, the court's instruction to reread the malice instruction (CALJIC No. 8.11) and to use their common sense and life experiences in defining the terms therein was proper. The California Supreme Court has held that it is proper to instruct a jury to

reread malice instructions, particularly where, as is the case here, the jury does not evidence any continued confusion after the direction is given. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212-1213.) Moreover, it was not error for the court to tell the jury to use its common sense and life experience in defining the terms in CALJIC No. 8.11. "[J]urors are expected to bring their individual backgrounds and experiences to bear on the deliberative process." (*People v. Pride* (1992) 3 Cal.4th 195, 268.) The court did not err in the manner it responded to the jury's question concerning the definition of terms contained in CALJIC No. 8.11.

E. *Court's Instruction under CALJIC No. 17.41.1*

Wenzel contends the court erred by instructing the jury under CALJIC No. 17.41.1. Wenzel asserts that these instructions impermissibly infringed on his federal and state constitutional rights to a jury trial and due process by eroding the privacy and secrecy of jury deliberations, thereby chilling the free exchange of jurors' views and their independent judgment and pressuring minority jurors to acquiesce in the views of the majority jurors. We reject these contentions.

The court instructed the jury under CALJIC No. 17.41.1 as follows:

> "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation."

The issue of the validity of CALJIC No. 17.41.1 is pending before the California Supreme Court in several cases, including *People v. Engelman* (2000) 77 Cal.App.4th

1297, review granted April 26, 2000, S086462, and *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted August 23, 2000, S088909. However, an almost identical issue was recently resolved by the high court in *People v. Williams* (2001) 25 Cal.4th 441 (*Williams*). The *Williams* decision compels the conclusion that Wenzel's contention the court erred in instructing under CALJIC Nos. 17.41.1 must be rejected.

In *Williams*, the Supreme Court was not asked to decide whether CALJIC No. 17.41.1 impermissibly invades the province of the jury by instructing them to follow the law, but the question of the power of the court to *remove* a juror who has refused to follow the law. (*Williams, supra,* 25 Cal.4th at p. 444.) The defendant claimed that the discharge of a juror in his case who refused to follow the law as given by the court was improper as it violated the juror's right to "jury nullification." (*Ibid.*)

The Supreme Court, relying on numerous and uniform federal and California authorities, concluded that while courts are powerless to correct an actual exercise of the power of jury nullification, courts do have the power and the obligation to remove jurors who refuse to follow the law and the court's instructions: "[T]he circumstance that the prosecution may be powerless to challenge a jury verdict or finding that is prompted by the jury's refusal to apply a particular law does not lessen the obligation of each juror to obey the court's instructions." (*Williams, supra*, 25 Cal.4th at p. 451.) The *Williams* court, quoting the United States Supreme Court, continued: """It is true, the jury may disregard the instructions of the court, and in some cases there may be no remedy. But it is still the right of the court to instruct the jury on the law, and the duty of the jury to obey the instructions."" [Citation.] . . . 'We must hold firmly to the doctrine that in the courts

of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be.' [Citation.]" (*Id.* at p. 451.)

Of particular relevance to our appeal, the court also rejected the defendant's contention that even if a court need not instruct the jury that it has the power to disregard the law, "neither should it instruct the jury to the contrary that it may not nullify the law . . . ." (*Williams*, *supra*, 25 Cal.4th at pp. 456-457.) In rejecting this contention, the court in *Williams* noted that public policy favors discouraging jurors from ignoring the law: "[I]t is important not to encourage or glorify the jury's power to disregard the law. While that power has, on some occasions, achieved just results, it also has led to verdicts based upon bigotry and racism. A jury that disregards the law and, instead, reaches a verdict based upon the personal views and beliefs of the jurors violates one of our nation's most basic precepts: that we are 'a government of laws and not men.' [Citation.]" (*Id.* at p. 459, fn. omitted.)

Thus, the court's instruction under CALJIC No. 17.41.1 did not improperly invade the jury process. The instruction simply restates the requirement that jurors conduct themselves during deliberations as required by the trial court's instructions.[9] As

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9 In this case, the jurors were admonished, among other things, that they have a responsibility to deliberate and act as impartial judges of the facts (CALJIC Nos. 17.40, 17.41); they must decide the case solely on the evidence presented to them and may not

instructed, jurors have a duty to follow the law and to decide the case in accordance with proper principles. They are not permitted to consider penalty or punishment, to allow passion or prejudice to influence their decisions or to attempt to nullify the law by refusing to fairly apply it. (*People v. Baca* (1996) 48 Cal.App.4th 1703, 1707; *People v. Fernandez* (1994) 26 Cal.App.4th 710, 714-716; *People v. Dillon* (1983) 34 Cal.3d 441, 487-488, fn. 39.) CALJIC No. 17.41.1 essentially summarizes those instructions governing the role of a juror, although restated in a way that makes it clear each juror has an obligation to inform the court if any other juror refuses to deliberate, expresses an intention to disregard the law, or expresses an intention to decide the case based on penalty or any other improper basis. Because jury deliberation constitutes an element of the right to a jury trial, a juror's refusal to deliberate or expressed intent to disregard the law or decide the case on an improper basis constitutes a failure to perform the juror's duty, justifying removal. (*Williams, supra,* 25 Cal.4th at p. 463.) As *Williams* states:

> "Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law." (*Williams, supra,* 25 Cal.4th at p. 463.)

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independently investigate the facts or the law, or consider or discuss facts as to which there was no evidence (CALJIC No. 1.03 (1998 rev.) (6th ed. 1996)); they must not discuss or consider the subject of penalty or punishment (CALJIC No. 17.42); they must not be influenced by pity for, or prejudice against, the defendant or by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling (CALJIC No. 1.00); they are not partisans or advocates in the case but rather impartial judges of the facts (CALJIC No. 17.41); and both parties have a right to expect the jurors will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences (CALJIC No. 1.00).

Therefore, CALJIC No. 17.41.1 does not compromise the integrity of the deliberative process, but simply restates some of the jurors' duties and informs them they should advise the trial court if they believe a fellow juror is engaging in misconduct. The instructions do not intrude on the secrecy of the deliberative process. The instructions do not require jurors to report *holdouts* or those who disagree with the majority, or to tell the court about their individual thought processes during deliberations. Finally, the instructions do not place undue pressure on a juror to not adhere to a decision disfavored by other jurors for fear he or she will be reported to the court. We presume that jurors follow the court's admonition that they should not change their opinions or decide any question in a particular way because the majority of jurors, or any of them, favors that decision. (See CALJIC No. 17.40.)

Wenzel asserts that instructing the jury under CALJIC No. 17.41.1 was particularly egregious in this case given a "hold out" juror's question whether Lyn was dead at the time Wenzel went upstairs and the court's subsequent instruction that there was no evidence that Lyn was already dead when Wenzel went upstairs. However, as we have already discussed, *ante*, the court's comment on the evidence in response to this question was entirely proper. Moreover, the juror here was not a holdout who disagreed with the remaining jurors concerning the state of the evidence. The juror's statement, "I can never know because I wasn't there. I'm not sure that she wasn't already dead," did not reflect a disagreement on the strength of the evidence. Rather, it reflected an unwillingness to come to any conclusion as to the cause of Lyn's death, despite the uncontradicted evidence that she died at Wenzel's hands, simply because the juror "wasn't

there." The jurors acted appropriately in reporting this juror's refusal to follow the court's instructions and deliberate based upon the evidence, and the court was justified in instructing the jury what the evidence was. Further, there is no indication that the court's comment upon the evidence and its instruction to the jury actually intimidated a holdout juror. The jury deliberated for an additional four days before reaching a verdict. The instruction under CALJIC No. 17.41.1 did not infringe upon the jurors' deliberations in this matter.

For the foregoing reasons, we conclude the court did not err by giving CALJIC No. 17.41.1. The instruction was neither intrusive nor coercive.[10] It correctly reminded the jurors of their duty to decide the case based on the evidence presented at trial and the law as instructed by the court.

F. *Court's Exclusion of Expert Testimony*

Wenzel asserts that the court erred in refusing to let his expert (Dr. Smith) answer hypothetical questions concerning Wenzel's mental state at the time of Lyn's murder. We reject this contention.

1. *Standard of Review*

We review a court's decision to admit or exclude expert testimony under the deferential abuse of discretion standard. (*People v. Mayfield* (1997) 14 Cal.4th 668, 766.)

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10 CALJIC No. 17.41.1 contains no language suggesting that a juror is exposed to personal sanctions if he or she refuses to follow the law, so there is no coercive aspect to this instruction. (Cf. *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1446 & fn. 2.)

2. *Analysis*

Section 28, subdivision (a) provides:

> "Evidence of a mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease , mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged."

Section 29 provides:

> "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect *shall not testify as to whether the defendant had or did not have the required mental states,* which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. *The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact*." (Italics added.)

Section 29 thus forbids a defense expert from testifying on the ultimate issue of whether a defendant had the requisite mental state at the time he committed the charged offense. (*People v. McCowan* (1986) 182 Cal.App.3d 1, 13, 14.) "The Legislature has determined that judges and jurors are capable of deciding whether a defendant's mental illness resulted in an inability to form the mental state required to sustain the charge. Such testimony is not 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .' [Citation.]" (*Id.* at p. 14.)

Wenzel asserts that the proposed testimony of Dr. Smith that was excluded by the court did not run afoul of section 29 because it was couched in terms of whether a

hypothetical person, suffering from the same disorder as Wenzel, would have formed the requisite malice necessary to be found guilty of murder. However, regardless of whether a hypothetical person was used as the basis of Dr. Smith's expert testimony, it was improper under section 29. Dr. Smith was required to assume facts identical to Wenzel's case and assume a hypothetical person with the identical psychological makeup as Wenzel. Dr. Smith would then be asked whether, at the time this hypothetical person put his hands over his wife's mouth and nose, he would have (1) carefully thought out what he was doing; (2) weighed the considerations for and against his conduct; (3) been acting based on reasoned judgment; (4) been deliberating his conduct; and (5) been acting under the emotion of the moment. Changing the subject of the testimony to a hypothetical person does not change the fact that Dr. Smith was going to testify whether Wenzel, at the time he killed Lyn, had the requisite intent necessary for murder.

In *People v. Nunn* (1996) 50 Cal.App.4th 1357, the trial court excluded the expert opinion of a defense witness that, based upon the defendant's inebriation and tendency to overreact to stress, he fired his rifle "impulsively" at the time of the offense. (*Id.* at pp. 1361-1362.) The defendant argued on appeal that this was proper because the expert avoided the use of the legal name of the mental state in question. (*Id.* at p. 1364.) However, in affirming the trial court's ruling, we rejected such "game playing." (*Ibid.*) As we stated there, "An expert may not evade the restrictions of section 29 by couching an opinion in words which are or would be taken as synonyms for the mental states involved." (*People v. Nunn, supra,* at p. 1364.)

Likewise in this case, Wenzel cannot evade the terms of section 29 by offering an opinion as to the mental state of a hypothetical person with the same mental condition at the time he or she committed an identical crime. To hold otherwise would render the limits imposed by section 29 meaningless. The court did not err in excluding that portion of defense expert Dr. Smith's testimony concerning Wenzel's mental state at the time he killed his wife Lyn.

G. *Court's Instruction Re Wenzel's Refusal To Cooperate with the Court-Ordered Psychiatric Exam*

Wenzel contends that the court erred in instructing the jury concerning his refusal to participate in a court-ordered psychological exam because such an examination was barred by the terms of Proposition 115 (§§ 1054-1054.8). We reject this contention.

Section 1054, subdivision (e) provides that "no discovery shall occur in criminal cases except as provided by this chapter, *other express statutory provisions,* or as mandated by the Constitution of the United States." (Italics added.)

Evidence Code section 730 provides in part:

> "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

Under Evidence Code section 730, a court may, in its discretion, order a psychiatric or psychological examination where a party's mental state is at issue. (*In re Marriage of Kim* (1989) 208 Cal.App.3d 364, 372; *People v. Ayala* (2000) 23 Cal.4th

225, 264.) Further, the California Supreme Court has upheld an instruction almost identical to the one challenged here where the defendant refused to abide by a court's order to submit to a mental examination after the defendant put his mental state in issue. (*People v. Carpenter* (1997) 15 Cal.4th 312, 412-413.) In upholding the instruction, the high court stated, "Defendant had no right to refuse to cooperate with the psychologist, so the jury could properly consider his refusal. [Citation.] The jury could properly infer that defendant wanted only his self-chosen experts, not others, to evaluate him, an inference relevant to its consideration of all evidence of his mental condition." (*Id.* at p. 413.)

Wenzel claims that the order compelling a psychiatric examination was improper as there is no express authority for such an examination, and therefore it violated the terms of section 1054, subdivision (e). Wenzel asserts that Evidence Code section 730 at most only allows the appointment of an expert, not a forced psychiatric examination. However, this ignores the terms of Evidence Code section 730. Evidence Code section 730 allows the court to appoint an expert to "investigate" an issue that the court deems should be the subject of expert testimony. Section 730 thus provides express authority for a court to compel a psychiatric examination. (See *In re Marriage of Kim, supra,* 208 Cal.App.3d at p. 372.) The court did not err in instructing the jury concerning Wenzel's failure to comply with a court ordered psychiatric examination.

H. *Instruction under CALJIC No. 2.90*

Wenzel contends that the court erred in instructing the jury under CALJIC No. 2.90, defining reasonable doubt, claiming that instruction is unconstitutional as it fails to

instruct the jury that they must find Wenzel's guilt by a standard of "evidentiary certainty" or "subjective state of near certitude." We reject this contention.

We conclude that CALJIC No. 2.90 properly defines the reasonable doubt standard of proof because it substantially adopts language suggested by the California Supreme Court in *People v. Freeman* (1994) 8 Cal.4th 450, 504, footnote 9. Other courts have consistently upheld this instruction against similar constitutional attacks. (*People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287; *People v. Miller* (1999) 69 Cal.App.4th 190, 213; *People* v. *Sanchez* (1997) 58 Cal.App.4th 1435, 1451; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1207-1209; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1571-1572; *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997, 998-1000.) We decline to adopt a contrary position and conclude the trial court properly instructed on reasonable doubt with CALJIC No. 2.90. As we stated in *People v. Carroll* (1996) 47 Cal.App.4th 892, 896: "We consider the opinion in *People v. Freeman, supra,* 8 Cal.4th 450 to be dispositive of this issue. The instruction comports with the Supreme Court's determination of what is the appropriate definition of reasonable doubt. It is for the Supreme Court to reconsider such definition if it chooses to do so. Our task is simple: we will apply the law as the Supreme Court has stated it."

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

McCONNELL, J.